No. 95-1165

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS W. MOORE, MARY L. MOORE,

Petitioners,

—vs.—

NEW YORK STATE (Hereafter NYS) COURT SYSTEM, MARIO M. CUOMO as Governor of NYS, ANN T. MIKOLL as Justice of NYS Supreme Court Appellate Division—Third Department (Hereafter JSC AD-3d), PAUL J. YESAWICH JR. JSC AD-3d, D. BRUCE CREW III JSC AC-3d, THOMAS E. MERCURE JSC AD-3d, NORMAN L. HARVEY JSC AD-3d, JOAN B. LEFKOWITZ, JSC, PATTERSON, BELKNAP, WEBB & TYLER as a Partnership of Attorneys, MARIO M. CUOMO as an Individual Attorney (Hereafter Esq.), ANN T. MIKOLL Esq., PAUL J. YESAWICH JR., Esq., D. BRUCE CREW III Esq., THOMAS E. MERCURE Esq., NORMAN L. HARVEY Esq., JOAN B. LEFKOWITZ Esq., JOHN D. WINTER Esq.,

Respondents.

(*Caption continued on inside front cover*)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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THOMAS W. MOORE, MARY L. MOORE,

Petitioners,

—v.—

THE COUNTY OF ROCKLAND of New York State, C. SCOTT VANDERHOEF, as County Executive, JAMES HENNESSY, as Deputy County Executive, GERALD DONNELLAN, Individually, BERNARD FALLON, Individually, PATRICIA PRENDERGAST, Individually, JOHN GRANT, Individually, DOES ONE through FIVE HUNDRED,

Respondents.

QUESTIONS PRESENTED

Respondents reformulate the questions presented as follows:

1. Whether Petitioners were provided the opportunity to participate in oral argument before the Court of Appeals?

2. Whether the Court of Appeals and the District Court erred in failing to find evidence of a conspiracy among the law firm, one of its partners and the federal and New York State judiciary?

3. Whether the Court of Appeals' summary order impermissibly lacked justifying reasons?

PARTIES

The names of all the parties appear in the caption of the case. No corporate disclosure is required because respondent Rockland County is a governmental entity and respondents C. Scott Vanderhoef, James Hennessy, Gerald Donnellan, Patricia Prendergast, Bernard Fallon and John Grant are individuals who were sued in their individual and official capacities. Respondent Patterson, Belknap, Webb & Tyler LLP is a limited liability partnership organized under New York law; it has no parent corporation or subsidiaries. Respondent John Winter is an individual.

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Decision and Order of the New York State Supreme Court dismissing Petitioner's Mary Moore's claims stemming from her termination of employment is unpublished and appears in the Petition for a Writ of Certiorari at Appendix F ("Pet. App." F, 36a-38a).

The Memorandum and Order of the Appellate Division, Third Department, affirming the state Supreme Court's decision is published at Moore v. County of Rockland, 192 A.D.2d 1021, 596 N.Y.S.2d (3d Dept. 1993); see also Pet. App. E, 30a-35a.

On September 30, 1994, after New York's appellate court had affirmed the dismissal of Ms. Moore's claims, the Honorable Thomas P. Griesa, the Chief Judge of the United States District Court for the Southern District of New York, issued an Opinion granting respondents' motions to dismiss two actions brought by Petitioners Mary and Thomas Moore (the "Moores"). The District Court's opinion is unpublished and appears at Pet. App. C, 24a-28a.

After a judgment was entered against them, the Moores moved to alter or amend the District Court's Order.

This motion was denied in all respects by Judge Griesa on November 18, 1994. The Moores appealed the denial of their motion to amend the judgment as well as the District Court's Order dismissing the two actions.

The United States Court of Appeals for the Second Circuit issued an Order and brief opinion on October 18, 1994 affirming the judgments of the District Court. The opinion is unpublished and appears at Pet. App. A, 16a-18a. Thereafter, the Moores moved for relief pursuant to 2d. Cir. R. 34(c), 2d. Cir. R. 34(d). This motion was denied on November 27, 1994.

28 U.S.C. § 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

United States Court of Appeals for the Second Circuit, Local Rule 34:

(c) **Postponement of Argument**. Except in the event of an emergency, such as unforeseen illness of counsel, an application to postpone the date for oral argument

will ordinarily not be favorably entertained. Engagement of counsel in courts (other than the Supreme Court of the United States) or administrative hearings will not be considered good cause for postponement. The date for oral argument may not be postponed by stipulation.

(d) **Determination by Court Not to Hear Oral Argument**.

1. If the court, acting sua sponte, contemplates deciding an appeal without hearing oral argument, each of the parties will be given an opportunity to file a statement setting forth reasons for hearing oral argument. Oral argument will be allowed in all cases except those in which a panel of three judges, after examination of the briefs and record, shall be of the unanimous view that oral argument is not needed for one of the following reasons:

(i) the appeal is frivolous; or

(ii) the dispositive issue or set of issues has been recently authoritatively decided; or

(iii) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

2. To prevent undue delay, incarcerated pro se appellants requesting oral argument shall file the above-mentioned statement of reasons at the time they file their briefs."

STATEMENT OF THE CASE

Course of Proceedings and Disposition of the Case Below

On June 20, 1991, Ms. Moore brought suit in New York State Supreme Court seeking redress for her termination of employment as the Director of Rockland County's Veterans Service Agency. Defendants in the action included Rockland County and several current or former county officials, including Messrs. Grant, Fallon, Donnellan and Ms. Prendergast. The complaint alleged seven causes of action including claims for: (1) conspiracy; (2) fraud; (3) civil service and due process violations; (4) intentional infliction of emotional distress; (5) whistle blower; (6) violation of the Administrative Code of Rockland County, section 5-32(e); and (7) violation of plaintiff's federal constitutional rights under 42 U.S.C. § 1983.

In an Order dated December 3, 1991, respondent Justice Joan Lefkowitz granted defendants' motion for summary judgment holding Ms. Moore was an "at-will"

employee and her status as an "at-will" employee was fatal to several of her claims. Justice Lefkowitz further determined many of Ms. Moore's claims were legally deficient and, therefore, subject to dismissal. Finally, Justice Lefkowitz concluded that portions of the complaint had to be dismissed because of procedural defects in Ms. Moore's state law causes of action. (Opinion of Justice Lefkowitz, Pet. App. F, 36a-38a).

Ms. Moore appealed this ruling. On April 29, 1993, the Appellate Division, Third Department, affirmed Justice Lefkowitz' decision dismissing Ms. Moore's seven causes of action.[1] (Third Department Memorandum and Order, Pet. App. E, 30a). Later, Ms. Moore sought leave to appeal the Third Department's decision to New York is Court of Appeals or to the United States District Court. The motion was denied on July 23, 1993. (Third Department Order, Pet. App. D, 29a).

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1 All of the judges who ruled on Ms. Moore's appeal are respondents here and are represented by New York State's Attorney General.

More than two years later, Ms. Moore, joined by her husband, Mr. Moore, filed two actions pro se in the Southern District of New York.

First Action: Moore v. New York State Court System, et al. (94 Civ. 0208). The first action, filed in January, 1994, named as defendants, inter alia, the New York State Court System; former Governor Mario Cuomo, in his official and individual capacities; the trial justice and the appellate justices who decided Ms. Moore's state court action' in their official and individual capacities; the law firm Patterson, Belknap, Webb & Tyler LLP, and a partner in that firm, Mr. Winter, who represented defendants in the state court action. The Moores alleged that in violation of 42 U.S.C. § 1983 defendants conspired to violate their constitutional rights by abusing the legal process to obtain the dismissal of Ms. Moore's state court action. An additional allegation was that defendants subjected the Moores to cruel and unusual punishment in violation of the Eighth Amendment by obtaining the dismissal of the lawsuit.

Second Action: Moore v. County of Rockland, et al. (94 Civ. 2678). In their second action, filed on April 14,

1994, the Moores sued the County of Rockland, Messrs. Vanderhoef, Hennessy, Donnellan, Fallon, Grant and Ms. Prendergast. With some minor variations, the allegations against these respondents were the same as those made in the previously dismissed state court action.

On September 30, 1994, Chief Judge Griesa issued an Opinion dismissing both actions brought by the Moores. (Opinion, Pet. App. C, 24a-28a). With respect to the first action, Moore v. New York State Court System, et al. (94 Civ. 0208), Judge Griesa determined that the court lacked subject matter jurisdiction over many of the claims asserted because of the broad principle of sovereign immunity, which applied to the State Court System, the Governor, and the justices who decided the state court action. Moreover, Judge Griesa concluded that the Moores failed to assert a factually sufficient statement of a valid cause of action against the Patterson, Belknap firm and the partner in the firm who defended the state court action. (Opinion, Pet. App. C, 26a-27a).

With respect to the second action, Moore v. County of Rockland, et al. (94 Civ. 2678), Judge Grisea concluded

that the doctrine of res judicata applied because the complaint did nothing more than repeat the previously dismissed state court allegations. (Opinion, Pet. App. C, 27a-28a).

On November 14, 1995, the Moores filed a motion to alter or amend the judgment of the District Court, which was denied in all respects on November 18, 1994. (Order, Pet. App. B, 21a).

On December 5, 1994, the Moores filed notices of appeal with respect to Judge Griesa's initial ruling as well as his denial of the Moores' motion to amend the judgement. (Notice of Appeal, Pet. App. B, 19a-20a).

Approximately nine months later, in September 1995, a clerk of the Court of Appeals notified Ms. Moore that a firm date for Oral Argument had been scheduled for October 12, 1995. (Petition for Writ of Certiorari, at 5). By letter dated September 26, 1995, Ms. Moore requested an adjournment of oral argument because of the illness of Mr. Moore, the co-appellant pro se. (Moore letter, Pet. App. A, 7a). In further support of Ms. Moore's request, Mr.Moore's physician submitted a letter stating that Mr. Moore recently underwent surgery. (Dr. Ng letter, Pet. App. A, 6a). In response, the

Clerk of the Court, by letter dated October 6, 1995, notified Ms. Moore the Court was unable to grant an adjournment of Oral Argument. The Clerk added, however, that the Court would allow Ms. Moore to argue on Mr. Moore's behalf as well as for herself as appellants pro se. (Clerk Letter, Pet. App. A, 8a).

The Moores declined to accept this invitation from the Court. Thereafter, respondents waived argument and the appeals from the judgments of the District Court were taken on submission by the Second Circuit. (Second Circuit Order, Pet. App. A, 16a).

In an Order and brief opinion filed and entered October 18, 1995, the Court of Appeals ruled the first federal court suit (Moore v. New York State Court System, et al.) was properly dismissed against the private defendants--the law firm and the lawyer representing the defendants in the state court action--because the complaint failed to allege any governmental action by these parties. Moreover, the Court of Appeals held that the suit was properly dismissed against the remaining defendants, who were protected either by judicial immunity or Eleventh Amendment immunity. The Court also

ruled the second suit (Moore v. County of Rockland, et al.) was properly dismissed because on the face of the complaint, the suit was barred by res judicata. Finally, the Court of Appeals enjoined the Moores from filing in another federal court challenging the termination of Ms. Moore's employment without obtaining leave to file such a suit from the court in which the lawsuit is being filed. (Order, Pet. App. A, 17a-18a).

Following receipt of this ruling, the Moores moved for relief pursuant to 2d. Cir. R. 34(c),(d). The motion reiterated the arguments asserted by Ms. Moore in her September 26 letter requesting a postponement of the oral argument due to Mr. Moore's illness. (Notice of Motion, Affidavit of Thomas Moore, Pet. App. A, 1a, 2a-5a). The motion was denied on November 27, 1995. (Motion Order, Pet. App. A, 1a).

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REASONS FOR DENYING THE WRIT

It is difficult to pinpoint the Moores' legal arguments supporting review of their petition for a Writ of Certiorari. There is no assertion by Petitioners that the decision of the

Court of Appeals involves an area of conflict among the circuit courts. Similarly, there is no assertion that the Court of Appeals misapplied Supreme Court precedent on an important federal question, or that the Court of Appeals decided an important question of federal law that has not been, but should be, settled by the Supreme Court. Finally, there is no assertion that the Court of Appeals acted in any way as to require the exercise of the Supreme Court's supervisory power.

Liberally construed, the Moores' petition alleges three reasons for Supreme Court review: (1) Petitioners were improperly denied the opportunity to participate in Oral Argument before the Court of Appeals; (2) The Court of Appeals and the District Court erred in failing to find evidence of a conspiracy among the law firm, Mr. Winter and the state and federal judiciary; and (3) the Court of Appeal's Order of November 27, 1995 summarily denying Petitioners' motion for a hearing impermissibly lacked justifying reasons.

First: The denial of Ms. Moore's request for an adjournment of oral argument was not a "judgment" or "decree" of the Court of Appeals within the meaning of 28

U.S.C. § 1254(1). Ms. Moore requested postponement in the form of a letter, not a motion. (Pet. App. A, 7a). The notice of denial of Ms. Moore's request came in the form of a Clerk's letter. (Pet. App. A, 8a). Thus, the denial of the request for an adjournment is not a matter susceptible to review by the Supreme Court. In any case, it is settled that a party has no constitutional entitlement to make an oral argument before a judicial tribunal. See FCC v. WJR, Goodwill Station, Inc., 337 U.S. 265, 274-77 (1949). The Courts of Appeal are entitled to make rules limiting oral argument. Fed. R. App. P. 34(a); 2d Cir. R. 34(d). Moreover, the Court of Appeals' action cannot be deemed a departure from accepted judicial proceedings because: (a) the Clerk invited Ms. Moore, the co-appellant, to address the Court at oral argument; and (b) 2d Cir. R. 34(c) explicitly notes that an application to postpone the date of oral argument "will ordinarily not be favorably entertained." Finally, the decision to grant or deny oral argument in accordance with the Local Rules of a Court of Appeals is a fact-specific inquiry that does not raise important legal questions for this Court's review.

Second: The Court of Appeals concluded it was not error to dismiss the case against the private defendants--the law firm and the lawyer representing the defendants in the state court action -- because the complaint failed to allege the private defendants acted in any way under color of state law. (Pet. App. A, 17a). This ruling was correct because governmental action is a requirement for a section 1983 cause of action. Monroe v. Pape, 365 U.S. 167 (1961). Thus the Court applied a properly stated rule of law, and no grounds for Certiorari exist. Even assuming the complaint did allege governmental action, the scope of the private defendants' acts is a fact-specific inquiry, and Certiorari is rarely granted when the asserted error consists of erroneous factual findings. United States v. Johnston, 268 U.S. 220, 227 (1925); see Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.).

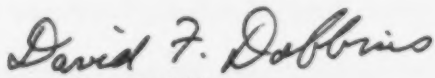
Third: A summary order is permissible. See 2d Cir. R. § 0.23. Such a common action does not raise important legal issues and does not call for an exercise of the Supreme Court's power of supervision or review.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Dated: New York, New York
February 21, 1996

Respectfully submitted,



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